	Case 5:08-cv-01602-JF	Document 8	Filed 05/14/2008	Page 1 of 4
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7	NOT FOR CITATION			
8	IN THE UNITED STATES DISTRICT COURT			
9	FOR THE NORTHERN DISTRICT OF CALIFORNIA			
10	TOR THE NORTHERN DISTRICT OF CALIFORNIA			
11	ROBERT E. GERKIN,)	No. C 08-1602	IF (PP)
12	Petitioner,)	ORDER OF DIS	
13	i cutioner,)	ORDER OF DIS ORDER DENY PETITIONER'S	ING
14	VS.		FOR RELIEF F JUDGMENT; D	ROM
15	M.C. KRAMER, Warden,		MOTIONS TO FORMA PAUP	PROCEED IN
16	Respondent.		MOOT	ERIS 715
17	— Respondent.		(Docket Nos. 1,	2, 4)
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19	Petitioner, a California prisoner proceeding pro se, filed a motion for relief from			
20	judgment pursuant to Federal Rule of Civil Procedure 60(b). Petitioner requests			
21	permission to raise new claims alleging fraud in his underlying 1995 criminal conviction			
22	in the Santa Clara Superior Court. Petitioner filed an earlier habeas action with this			
23	Court, case number C 01-20766 JF (PR), challenging the same conviction and sentence			
24	raised in the instant motion. In case no. C 01-20766 (PR), the Court denied the petition			
25	on the merits on December 19, 2003. The Court of Appeals affirmed this Court's denial			
26	of the petition in August 2005. The Court will DISMISS the instant habeas action as a			
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28	Order of Dismissal; Order Denying Petition Forma Pauperis as Moot P:\pro-se\sj.jf\hc.08\Gerkin602dissuc	er's Motion for Relie	f from Judgment; Denying	Motions to Proceed in

second or successive petition pursuant to 28 U.S.C. § 2244(b).

DISCUSSION

Petitioner moves the Court for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). In the instant motion, Petitioner alleges two new claims for habeas relief: (1) the prosecution committed misconduct by convincing the trial court that it did not have to exclude any of the prosecution's witnesses from the preliminary examination; and (2) the prosecution acted in collusion with the expert witness to expound a theory developed by the witness and her business partner at their anger management clinic.

A Rule 60(b) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction. Gonzalez v. Crosby, 545 U.S. 524, 537-38 (2005). If neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statue and rules. Id. at 533.

A Rule 60(b) motion that contains one or more "claims," i.e., an asserted basis for relief from a state court's judgment of conviction, is, if not in substance a successive habeas petition, at least similar enough that failing to subject it to the same requirements would be inconsistent with the habeas statute. Gonzalez, 545 U.S. at 530-31. In most cases, determining whether a Rule 60(b) motion advances one or more "claims," and therefore should be treated as a successive habeas petition, will be relatively simple. Id. at 532. A motion that seeks to add a new ground for relief will of course qualify. Id. A motion can also be said to bring a "claim" if it attack's the federal court's previous resolution of a claim on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. Id. at 532; see also Allen v. Ornoski, 435 F.3d 946, 957 (9th Cir. 2006)

Order of Dismissal; Order Denying Petitioner's Motion for Relief from Judgment; Denying Motions to Proceed in Forma Pauperis as Moot

(in most cases, a Rule 60(b) motion should be treated as a successive habeas petition if the factual predicate for the motion also states a claim for a successive petition under 28 U.S.C. § 2244(b)); Ortiz v. Stewart, 195 F.3d 520, 520-21 (9th Cir. 1999) (same); Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir. 1998) (same).

A district court must dismiss claims presented in a second or successive habeas petition challenging the same conviction and sentence unless the claims presented in the previous petition were denied for failure to exhaust. See 28 U.S.C. § 2244(b)(1); Babbitt v. Woodford, 177 F.3d 744, 745-46 (9th Cir. 1999). Additionally, a district court must dismiss any new claims raised in a successive petition unless the petitioner received an order from the court of appeals authorizing the district court to consider the petition. See 28 U.S.C. § 2244(b)(2), (3).

The Court construes Petitioner's motion pursuant to Rule 60(b) as a second or successive petition challenging the same conviction and sentence as in Petitioner's earlier habeas action, C 01-20766 JF (PR). Petitioner raises two new claims of error in his 1995 Santa Clara Superior Court criminal proceedings. See Pet.'s Motion at 6-10. The instant motion challenges the same conviction and sentence as the earlier petition in case no. C 01-20766 JF (PR). This earlier habeas petition was denied on the merits, and Petitioner has not presented an order from the Court of Appeals authorizing this Court to consider any new claims. Accordingly, this Court must dismiss the instant habeas action in its entirety. See 28 U.S.C. § 2244(b)(3)(A).

CONCLUSION

Petitioner's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) (docket no. 1) is DENIED. The instant habeas action is DISMISSED without prejudice as a second and successive petition pursuant to 28 U.S.C. § 2244(b).

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Filed 05/14/2008

Page 4 of 4

Case 5:08-cv-01602-JF

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